(2)

No. 06-819

FILED
APR 4 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

MARSHALL K. FLOWERS and ANNA FLOWERS,

Petitioners,

v.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary of the Army; JOHN OHLWEILER, Captain,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT FIRST HAWAIIAN BANK'S BRIEF IN OPPOSITION

JOHN T. KOMEIJI
GARY S. SUGANUMA
Counsel of Record
WATANABE ING & KOMEIJI, LLP
First Hawaiian Bank Center
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813
Phone: (808) 544-8300
Facsimile: (808) 544-8399
Attorneys for Respondent First Hawaiian Bank

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED AS TO FIRST HAWAIIAN BANK

1. Whether it was proper for the district court to bar re-deposition of Army personnel upon a finding that such testimony would be irrelevant to any of the remaining claims against Respondent First Hawaiian Bank;

2. Whether Petitioners Marshall K. Flowers and Anna Flowers' motion to stay summary judgment pursuant to FRCP Rule 56(f) was properly denied where there had been ample time for discovery, and there had been no showing that further discovery could lead to a different conclusion; and

3. Whether summary judgment on the issue of damages was properly granted in favor of First Hawaiian Bank.

RULE 29.6 STATEMENT

First Hawaiian Bank's parent corporation is BancWest Corporation, a Delaware Corporation owning 100% of First Hawaiian Bank stock. BancWest Corporation is wholly owned by BNP Paribas, a foreign corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED AS TO FIRST HAWAIIAN BANK	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
OPINIONS AND ORDERS BELOW	1
A. The Instant Appeal	1
B. Prior Appeal	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT	3
REASONS FOR DENYING THE PETITION	13
A. Petitioners Have Not Presented Any Issue As To First Hawaiian Involving A Conflict Of An Important Question Of Federal Law	14
B. The Issues Presented As To First Hawaiian Involve Only Challenges To The Lower Court's *De Novo* Review Of The Factual And Evidentiary Record	17
C. The Issues Presented As To First Hawaiian Do Not Extend Beyond The Petitioners Herein And Do Not Give Rise To Any Issue Of National Importance	18
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Flowers v. First Hawaiian Bank, 85 F.Supp.2d 993 (D. Haw. 2000) 1

Flowers v. First Hawaiian Bank, 295 F.3d 966 (9th Cir. 2002) 1, 16

Flowers v. First Hawaiian Bank, 289 F.Supp.2d 1213 (D. Haw. 2003) 1

Flowers v. First Hawaiian Bank, 295 F.Supp.2d 1130 (D. Haw. 2003) 1

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 17

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 15, 18

United States v. Johnston, 268 U.S. 220 (1925) 18

STATUTES

12 U.S.C. § 3401 *et seq.* 2, 4

12 U.S.C. § 3417 ..... 2, 3

12 U.S.C. § 3417(a)(2) 3

28 U.S.C. § 1254(1) 2

RULES

9th Cir. R. 36-3 ..... 3, 14

FRCP Rule 56(f) ..... *passim*

Sup. Ct. R. 10 ..... 14, 15, 17

Sup. Ct. R. 10(a) 16

BRIEF IN OPPOSITION

Respondent First Hawaiian Bank (hereinafter "First Hawaiian") respectfully submits this brief in opposition to the petition for a writ of certiorari.

OPINIONS AND ORDERS BELOW

A. The Instant Appeal

The court of appeals' order denying petition for panel rehearing and petition for rehearing *en banc* and memorandum opinion are unreported. Pet. App. 1a, 2a-7a. The district court's order reversing discovery order allowing redeposition of Army personnel is reported at 289 F.Supp.2d 1213 (D. Haw. 2003). Pet. App. 81a-97a. The district court's order granting First Hawaiian summary judgment and denying FRCP Rule 56(f) continuance is reported at 295 F. Supp.2d 1130 (D. Haw. 2003). Pet. App. 59a-80a.

B. Prior Appeal

The district court's order granting First Hawaiian judgment on the pleadings is reported at 85 F.Supp.2d 993 (D. Haw. 2000). CR[99-335] 33.[1] The court of appeals' opinion reversing First Hawaiian's judgment on the pleadings and remanding the case is reported at 295 F.3d 966 (9th Cir. 2002).

[1] References to the docket in Civil No. 99-335 are referred to as "CR[99-335]" followed by the docket number assigned to it.

JURISDICTION

Petitioners Marshall K. Flowers and Anna Flowers (hereinafter collectively "Petitioners") invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). First Hawaiian does not dispute the jurisdiction of this Court.

STATUTORY PROVISION INVOLVED

The Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* (hereinafter "RFPA"), provides in relevant part:

> **§ 3417 Civil Penalties**
>
> **(a) Liability of agencies or departments of the United States or financial institutions.** Any agency or department of the United States or financial institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of –
>
> (1) $100 without regard to the volume of records involved;
>
> (2) any actual damages sustained by the customer as a result of the disclosure;
>
> (3) such punitive damages as the court may allow, where the violation has been willful or intentional; and
>
> (4) in the case of any successful action to enforce liability under this section, the cost of the action together with reasonable attorney's fees as determined by the court.
>
> * * *

> **(d) Exclusive judicial remedies and sanctions.** The remedies and sanctions described in this title shall be the only authorized judicial remedies and sanctions for violations of this title.

12 U.S.C. § 3417.

STATEMENT

The unpublished decision below is entirely fact-bound as to First Hawaiian. The court of appeals affirmed summary judgment in favor of First Hawaiian based on the complete lack of evidence in the record to support the Petitioners' claim for damages. The decision as to First Hawaiian does not conflict with any decision of this Court, another court of appeals, or a state high court. The decision also does not present an important question as to First Hawaiian that warrants this Court's review. Lastly, the unpublished decision cannot be cited as binding precedent under the Rules of the Ninth Circuit Court of Appeals. *See* 9th Cir. R. 36-3. The petition should be denied.

The facts pertinent to First Hawaiian are as follows. On October 22, 2003, First Hawaiian filed its motion for summary judgment as to all claims for compensatory[2] damages. CR 371.[3] On that same date, First Hawaiian filed its substantive joinder to Respondent Fort Jackson Federal Credit Union's ("FJFCU") motion for partial

[2] Referred to as "actual" damages in the RFPA. 12 U.S.C. § 3417(a)(2).

[3] References to the docket in Civil No. 01-412 are referred to as "CR" followed by the docket number assigned therein.

summary judgment regarding the Petitioners' claims for punitive damages.[4] CR 368. Previously, on April 9, 2003, First Hawaiian admitted to committing a violation of the RFPA leaving only the issue of damages in dispute. CR 217.

On November 13, 2003, Petitioners filed a motion to stay First Hawaiian's and FJFCU's motions for summary judgment pursuant to FRCP Rule 56(f). CR 404. The motion did not meet the requirements of Rule 56(f) insofar as it did not state what specific facts Petitioners hoped to discover and how it would preclude summary judgment. CR 404.

On December 5, 2003, the district court entered its order denying the Rule 56(f) request and granting summary judgment in favor of First Hawaiian as to the claims for actual and punitive damages based on the lack of any evidence to support the claims, and the Petitioners' failure to show any possibility of such evidence. Pet. App. 59a-80a. In its order, the district court succinctly set forth a summary of the procedural history and facts of this matter. The following are the portions of the district court's summary pertinent to First Hawaiian:

> Plaintiff Marshall Flowers brought these suits primarily under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* ("RFPA"), after Defendants First Hawaiian Bank and Fort Jackson Federal Credit Union provided bank records to the United States Army after receiving military subpoenas during Article 32 investigatory

[4] First Hawaiian and FJFCU also filed other motions for summary judgment and substantive joinders on this same date which are not at issue in the petition and therefore not discussed herein.

proceedings against then-Sergeant-Major Flowers. This Court dismissed the suit against First Hawaiian Bank, but the Ninth Circuit remanded to this Court after determining that an Article 32 subpoena was invalid and that litigation and grand jury exemptions under 12 U.S.C. §§ 3413(e) and 3413(i) did not apply. *See Flowers*, 295 F.3d at 970-77.

After remand, this Court consolidated the First Hawaiian Bank matter (Civ. No. 99-00335) with a similar matter involving Fort Jackson FCU (Civ. No. 01-412). Fort Jackson FCU consented to personal jurisdiction in Hawaii and the cases were consolidated upon Fort Jackson's motion to consolidate.

* * *

The Army's underlying Article 32 proceedings are collateral to the RFPA claims at issue in this case. The Court's role here is not to resolve or even to address the validity of the past larceny charges against Marshall Flowers. It has become apparent, however, that those charges and proceedings, although collateral, are nevertheless relevant to the primary remaining issues (causation and damages) in this suit. Plaintiffs and Defendants have provided much of the evidence or procedural history of those military proceedings as part of this RFPA case. Marshall Flowers spends much effort discussing those allegations and attempting to refute some of the evidence. He contends that the Bank Defendants' financial disclosures – not the underlying military proceedings – caused him damages, to wit, his leaving the Army two years short of his goal of 30 years of service. The Court therefore sets forth some of the relevant background of the charges

and the underlying procedural history as necessary to explain why the financial disclosures, even if either Bank Defendant violated the terms of the RFPA, nevertheless are not responsible for Plaintiffs' alleged damages.

The evidence in the record provides, among other things, as follows:[1]

In December of 1997, SGM Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video.

Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. The evidence obtained by the CID appears to be substantial, although there apparently is or was some question about some of its admissibility in a subsequent criminal trial. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer.

In April of 1998, the Army filed 42 charges of larceny against Flowers. An Article 32 investigation

---

[1] Although Plaintiffs attempt to dispute some of the details, the evidence is uncontradicted in any pertinent part. Any disputes of fact are not material to the issues now before the court.

was begun but proceedings were postponed at the request of defense counsel until June of 1998.

On June 19, 1998, a DD Form 453 subpoena was issued by the United States Army to First Hawaiian Bank requesting "all bank records, # 25478010, to include all deposits and withdrawals." This account belonged to Marshall and Anna Flowers. It stated that it was issued for an "Article 32 hearing" and cites Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena, as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)."

First Hawaiian Bank notified Marshall Flowers of the subpoena by letter dated July 1, 1998, although it did not do so pursuant to the RFPA nor did it otherwise comply with the RFPA. The notification appears to have been done as a matter of courtesy. First Hawaiian Bank did not actually produce the documents to the Army until August 12, 1998.

* * *

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer issued a report reviewing the evidence and recommended that the charges against SGM Flowers be adjudicated in a trial by General Court-Martial. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding.

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittens. Mr. Gittens specializes in military defense cases and is known for handling

"high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru.

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and . . . wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement." Gittens prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998.

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittens, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely believe demanding a trial by court-martial is irresponsible and totally unsound . . .

I urge you to reconsider and accept the Article 15 offered to you in this case." Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittens, on August 22, 1998 and by the Army on August 28, 1998.

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented at the Article 15 proceeding.

Flowers appealed the Article 15 punishment. (As part of the appeal, Flowers treats the financial information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case."). The appeal was denied by General Hill.

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement According to an Affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. A second Article 32 hearing was eventually held on March 18 and 19,

> 1999. The result of the second hearing appears to have been favorable to Flowers. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had apparently decided to proceed with a General Court-Martial anyway.
>
> At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." General Hill approved the bar and testified that such a bar should have been imposed long before as a matter of course once charges were preferred.
>
> On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. The appeal was denied on June 21, 1999. General Hill then directed that Flowers had 14 days to submit his retirement. Flowers presumably then retired with full military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

Pet. App. 61a-69a (internal citations to evidentiary support omitted).

With regards to the granting of summary judgment in favor of First Hawaiian as to punitive damages, the court determined that there was no evidence coming close to the

"willfulness" standard for such an award under the RFPA. Pet. App. 72a. With regards to the Petitioners' Rule 56(f) request for more time to discover evidence to support their claim for punitive damages, the district court denied the request based on the Petitioners' failure to show that such evidence could possibly result from additional discovery. The court reasoned:

> The only question is whether to allow the Plaintiffs more time for discovery under Rule 56(f) to seek evidence of willfulness. But there has been no showing of any possibility of such evidence. The relevant discovery has occurred. Plaintiffs have obtained depositions or documents, or had an opportunity to discover such evidence, from all the First Hawaiian Bank and Fort Jackson FCU employees who had contact or responsibility with compliance with the particular subpoenas at issue. Further discovery in this regard from the Army witnesses would not be relevant to the state of mind of the Bank Defendants. At best, Plaintiffs have some hope that evidence of egregiousness will develop and this is not enough.

Pet. App. 73a-74a.

With regards to the granting of summary judgment as to compensatory or actual damages, the district court determined that Petitioners lacked any evidence to establish a causal link between First Hawaiian's disclosure of their bank records and their claimed damages.

> Marshall Flowers cannot prove that his allegedly forced retirement had anything to do with the disclosures. The records disclosed appear to be nothing more than bank statements. True, bank statements contain personal information. However, the undisputed evidence is that the Army did not even have the records at the time of the

> first Article 32 hearing. The information in the records had nothing to do with the decision to prosecute Flowers, to pursue an Article 32, to cause the Army to impose a bar to re-enlistment, or otherwise to cause Flowers to retire early. The Army's determination to begin Article 32 proceedings against Marshall Flowers *preceded* the release of financial records. The Army's recommendation to proceed with a General Court-Martial had nothing to do with the release of records. Any subsequent discipline the Army imposed had nothing to do with the release of financial records. There simply is no evidence that any alleged damages could have been caused by First Hawaiian Bank's (or, for that matter, Fort Jackson FCU's) release of financial information. (If anything, the financial information helped him or could have helped him if it is true that there was nothing incriminating in the records as Flowers has argued.)

Pet. App. 77a (internal citations to evidentiary support omitted).

In denying the Petitioners' Rule 56(f) request for a continuance to allow more time to conduct discovery as to compensatory damages, the district court stated:

> The Court can conceive of no evidence that would create a genuine issue of fact that the financial disclosures by First Hawaiian Bank would have caused the Army to impose a bar to re-enlistment for SGM Flowers, and there is nothing in the present record to indicate as such. There is every indication that the Army's decision to end SGM Flowers' career was independent of the technical RFPA violations. There being no genuine issue of material fact, the Court GRANTS First Hawaiian Bank's Motion for Summary Judgment, insofar as it seeks a finding that Plaintiffs are not

> entitled to any damages under the RFPA in excess of the statutory damages.

Pet. App. 78a.

In an unpublished memorandum decision filed on May 3, 2006, the court of appeals affirmed summary judgment in favor of First Hawaiian on the claims of compensatory and punitive damages. Pet. App. 1a-7a. The court of appeals properly rejected the Petitioners' challenge based on the lack of any evidence to support their claim for damages, stating:

> The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. . . . There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of the bank or the credit union and the Flowers' claimed damages, and nothing suggests that [First Hawaiian] or the credit union acted willfully or intentionally to violate the Flowers' rights under the RFPA.

Pet. App. 5a-6a. The court of appeals also affirmed the denial of the Petitioners' Rule 56(f) motion to stay summary judgment and other discovery rulings. The court determined that the Petitioners' challenge to those rulings also lacked merit. Pet. App. 6a.

REASONS FOR DENYING THE PETITION

The unpublished decision of the court of appeals is entirely fact-bound as to First Hawaiian. The court correctly applied the *de novo* standard of review in affirming

summary judgment in favor of First Hawaiian, and properly rejected the challenge by Petitioners based on the absence of any evidence to support their claim for damages. The decision as to First Hawaiian does not conflict with any decision of this Court, or any decision of a court of appeals or state high court. The only conflict alleged in the petition pertains to the *Feres* doctrine, an issue that does not involve First Hawaiian. Moreover, the decision as to First Hawaiian does not extend beyond Petitioners herein, and does not involve any constitutional issue or other important federal question that could give rise to an issue of national importance. Finally, the unpublished decision cannot be cited as binding precedent under the Rules of the Ninth Circuit Court of Appeals. *See* 9th Cir. R. 36-3. Accordingly the decision presents no compelling reason warranting this Court's attention. The petition should be denied.

A. Petitioners Have Not Presented Any Issue As To First Hawaiian Involving A Conflict Of An Important Question Of Federal Law

Supreme Court Rule 10 provides that a "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for compelling reasons*." Sup. Ct. R. 10 (emphasis added). The rule also sets forth examples illustrating the character of reasons that may justify the granting of certiorari. The examples provided in the rule suggests that compelling reasons for certiorari will most commonly arise where there exists a *conflict of an important question of federal law* between the decision in question and a

decision of this Court, another court of appeals, or a state court of last resort.[5] *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) (certiorari should not be granted except "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals"). The decision as to First Hawaiian does not present such a conflict.

The only conflict of a federal question raised in the petition pertains to the application of the *Feres* doctrine to bar the Petitioners' RFPA claims against the Army respondents. In fact, nearly the entire petition is dedicated to the *Feres* issue. *See* Pet. However, the *Feres* doctrine applies only to the Army respondents, as that doctrine, where applicable, operates to bar suits only against the government. Pet. App. 3a-4a. First Hawaiian is not a governmental entity and has never asserted the *Feres* doctrine as a defense to the RFPA claims brought against

---

[5] Supreme Court Rule 10 states the following pertinent examples dealing with decisions by a federal circuit court of appeals:

> (a) a United States court of appeals has entered a decision in *conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort*; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure of the lower court, as to call for an exercise of this Court's supervisory power.
>
> * * *
>
> (c) a state court or a United States court of appeals has decided an *important question of federal law that* has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10 (emphasis added).

it. To the contrary, First Hawaiian admitted to committing a violation of the RFPA pursuant to the court of appeals' decision in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), thus leaving only the issue of damages in dispute. CR 217.

Even though the *Feres* doctrine does not apply to First Hawaiian, Petitioners have attempted to link First Hawaiian (and FJFCU) to that issue by asserting that the deposition testimony of Army personnel was necessary to defeat summary judgment and that the dismissal of the Army pursuant to the *Feres* doctrine was the reason re-deposition of Army personnel was not permitted. *See* Pet. 25.[6] That assertion is not accurate. The orders of the district court indicate clearly that re-deposition of Army personnel was not permitted based on the court's determination that such testimony would be irrelevant to the remaining claims against First Hawaiian and FJFCU. Pet. App. 73a-74a, 95a-96a. Accordingly, the *Feres* doctrine had nothing to do with the court's denial to allow re-deposition of the Army personnel.

Therefore, Petitioners have not presented any issue involving a conflict of an important federal question as to First Hawaiian. Nor have they alleged that the court of appeals' *de novo* review constituted an unacceptable departure by the lower court from its accepted and usual course of judicial proceedings requiring an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a). Accordingly, there

---

[6] Petitioners argue: "This Court should grant review since the court's import of *Feres* prohibited the Flowers from obtaining discovery of federal witnesses to adequately respond to the financial institutions motions for summary judgment." Pet. 25.

is no compelling reason for the granting of certiorari and the petition should be denied.

B. The Issues Presented As To First Hawaiian Involve Only Challenges To The Lower Court's *De Novo* Review Of The Factual And Evidentiary Record

The court of appeals correctly affirmed summary judgment in favor of First Hawaiian based on a *de novo* review of the record which revealed the absence of any evidence to support the Petitioners' claim for damages. It is evident from the petition that Petitioners seek to have this Court conduct a further *de novo* review of the record evidence as the petition states "We believe the district judge abuse[d] his discretion by denying the Flowers' Rule 56(f) motion and granting the financial institutions summary judgment." Pet. 28.

The Petitioners' request for this Court to perform the role of a circuit court of appeals is not an appropriate grounds for granting certiorari. Supreme Court Rule 10 expressly cautions that "*[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.*" Sup. Ct. R. 10 (emphasis added).

Moreover, this Court has long held that challenges based on the factual record or on the weighing of evidence is not a sufficient basis for the granting of certiorari. *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) (Supreme Court is not the place to review a conflict of evidence and so where conclusions of the court of appeals depends on appreciation of circumstances which admit of different interpretation, the Supreme Court will

not interfere); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (Supreme Court does not grant certiorari to review evidence and discuss specific facts).

The Petitioners' challenges to the lower court's decision based on asserted error of the court's factual and evidentiary determinations do not constitute compelling reasons for granting certiorari. The petition should be denied.

C. The Issues Presented As To First Hawaiian Do Not Extend Beyond The Petitioners Herein And Do Not Give Rise To Any Issue Of National Importance

This lawsuit was brought by Petitioners only, and not a class of individuals. Petitioners seek only monetary damages based on the disclosure of their bank records. Clearly, the issues presented as to First Hawaiian do not extend beyond the Petitioners herein which presents yet another reason to deny the petition. *See Rice,* 349 U.S. at 79 (certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties").

In addition, the questions presented as to First Hawaiian do not involve any constitutional issues or any other matters giving rise to an issue of national importance. The Petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied as to First Hawaiian.

Respectfully submitted,

JOHN T. KOMEIJI
GARY S. SUGANUMA
WATANABE ING & KOMEIJI, LLP
First Hawaiian Bank Center
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813
Phone: (808) 544-8300
Facsimile: (808) 544-8399
Attorneys for Respondent
First Hawaiian Bank